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September 15, 2003

VIA HAND DELIVERY

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Mr. Vernon Williams, Secretary
Office the Secretary
Surface Transportation Board
1925 K Street, N.W., Room 700
Washington, D.C. 20423-0001

RE: Finance Docket No. 34192 (Sub-No. 1)
Hi Tech Trans LLC - - Petition for Declaratory Order - -
Rail Transload Facility at Oak Island Yard, Newark, NJ

Dear Secretary Williams:

Enclosed for filing is NJDEP's *Reply to Petitions to Intervene and Comments of Norfolk Southern Railway Company, Delaware and Hudson Railway Company, Inc. and Canadian National Railway Company.*

In accordance with the Board's rules, we have enclosed the original and 10 copies of this letter and request that the extra copy be date-stamped and returned so that our files may properly evidence this filing.

If you have any questions concerning this, please do not hesitate to contact us.

Very truly yours,

Edward D. Greenberg

EDG
cc: All parties of record (via Facsimile and USPS)

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET 34192 (SUB-NO. 1)
HI TECH TRANS, LLC - - PETITION FOR DECLARATORY ORDER -
RAIL TRANSLOAD FACILITY AT OAK ISLAND YARD, NEWARK, NJ

STATE OF NEW JERSEY
DEPARTMENT OF ENVIRONMENTAL PROTECTION
REPLY TO PETITIONS TO INTERVENE AND COMMENTS OF
NORFOLK SOUTHERN RAILWAY COMPANY,
DELAWARE AND HUDSON RAILWAY COMPANY, INC. AND
CANADIAN NATIONAL RAILWAY COMPANY

The State of New Jersey Department of Environmental Protection ("NJDEP") submits the following as its reply to the Petitions to Intervene and Comments of Norfolk Southern Railway Company ("NS"), Delaware and Hudson Railway Company, Inc. d/b/a Canadian Pacific Railway ("CP") and Canadian National Railway Company ("CN").

I. INTRODUCTION

In this case, the Board has been presented with an attempt by Hi Tech Trans, LLC, ("Hi Tech") to circumvent the environmental statutes and regulations applicable to solid waste facilities operating in New Jersey. As the Board is aware, that attempt has involved Hi Tech's initiation of litigation in four other fora.[1] But the end of this effort is near, as the Board has now issued two decisions that properly reiterate the limits of the preemption provision in 49 U.S.C. § 10501(b) and expose Hi Tech's delaying and obfuscation tactics to the light of day.

The most recent decision, served August 14, 2003 ("*Hi Tech II*") was appealed by Hi Tech on August 23, 2003 ("Hi Tech Appeal"). In its September 4, 2003 reply to that appeal ("NJDEP

[1] *See* the NJDEP Reply to the Hi Tech Petitions for Declaratory Order and For Emergency Order and Other Relief, filed July 7, 2001 in this docket ("NJDEP Reply"), at 5-9, for a description of these proceedings. Hi Tech's Petitions for Declaratory Order, etc. will be referred to herein as "Hi Tech's Petitions".

Reply), NJDEP explained why that decision is fully consistent with both Board and court precedent; it is accordingly unnecessary to burden the agency with a repetition of those arguments and respectfully refers the Board to the discussion contained therein. NJDEP is now responding to 11th hour comments submitted by several railroads that have elected to file intervention petitions. CP and CN contend that the decision in *Hi Tech II* was incorrect and seek to have the Board expand the § 10501(b) preemption so as to preclude effective state and local oversight of solid waste (or indeed of any potentially hazardous or toxic material) facilities that are owned, operated and controlled by parties that even Hi Tech agrees are only shippers. On the other hand, NS points out that *Hi Tech II* was consistent with past Board and court precedent and that there are strong public policy justifications that support limiting the preemption provision in § 10501(b) to transportation provided by rail carriers. NS accordingly urges the Board not to expand the preemption to include the activities of shippers or third-party intermediaries.

NS has it exactly correct, as NJDEP has pointed out in its various submissions to the Board in this matter. The positions espoused by CP and CN would impermissibly broaden the preemption so as to evade state and local regulation of activities that take place prior to the delivery of product to a rail carrier. That contention was properly rejected in both in the decision served in this proceeding on November 20, 2002 ("*Hi Tech I*")[2] and *Hi Tech II,* and the CP and CN arguments should again be rejected.

II. COUNTER STATEMENT OF FACTS

CP contends erroneously that Hi Tech's role in the transportation of solid waste is somehow "much greater than that normally associated with a shipper" (CP Petition, at 2.) But, as *Hi Tech II* correctly pointed out (at 6), Hi Tech's only function is as a shipper. As is the case with any shipper, Hi Tech provides cargo, loads it in rail cars, tenders it to a railroad for movement and the rail carrier performs the transportation. The decision, again, correctly pointed out that both Hi Tech and CP boasted that Hi Tech was the largest shipper at this CP station. That Hi Tech enters into agreements

[2] *Hi Tech I* was not appealed and has become final. 49 C.F.R. § 111.5.2(g).

with third parties seeking to move solid waste to disposal sites or consolidates this commodity to optimize car usage changes nothing; it is still a shipper in its relationship with the CP.

Even assuming, *arguendo,* that Hi Tech is some type of intermediary and has no beneficial interest in the solid waste or the disposal sites (and Hi Tech provided no evidence supporting that proposition), it would still be a shipper in its relationship to the CP. One possible characterization of its role is that it could be a surface freight forwarder. The statute defines a freight forwarder as "a person holding itself out to the general public *(other than as a pipeline, rail, motor or water carrier)* to provide transportation of property for compensation and in the ordinary course of business" assembles and consolidates and breaks bulk or distributes the commodities, assumes responsibility for the transportation and uses the services of a regulated carrier.[3] 49 U.S.C. § 13102(8) (emphasis supplied). Thus, even if Hi Tech assumed responsibility for the transportation (which appears not to be the case, since the traffic moves under CP's bills of lading), by definition a freight forwarder cannot be a rail carrier. And, if it is not a freight forwarder, it must be - - whether it consolidates shipments or not - - a shipper's agent, as it is clearly not acting as CP's agent.[4]

CP next contends that Hi Tech's facilities are integral to CP's transportation of construction and demolition ("C&D") waste. (CP Petition, at 2.) Aside from the obvious hyperbole about the need for Hi Tech's investment and expertise,[5] the same can be said of the chemical storage and rail loading facilities of, for example, the Dupont Chemical Company at Wilmington, Delaware. Without Dupont's "capital and expertise," railroads would not be moving any substantial volume of that company's chemicals. But that does not convert Dupont into a rail carrier or preempt state and local environmental regulation of its rail related facilities.

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[3] Even if a freight forwarder is a carrier with respect to its relationship to its customers, it is a shipper in its relationship to the carrier. *See Railroad Transportation Contracts,* 367 I.C.C. 9, 14(1982).

[4] That Hi Tech is not acting as the agent of CP is amply demonstrated by the terms of the Operational License and Transportation Agreements entered into by the parties. Again, in order to avoid unnecessary duplication, NJDEP respectfully directs the Board to the discussion of this issue in the NJDEP Reply, at 15-19. Moreover, in its petition, at 7 n.2, CP tacitly concedes that there is currently no principal/agency relationship between the parties.

[5] Hi Tech's "capital" investment appears to be the open-topped containment structure that is pictured in the photographs included in NJDEP's reply at Exhibit 10.

CP's allegation that it has a "significant interest" and exercises "significant control" over Hi Tech's operations (CP Petition at 2) is misleading and inaccurate. Again, any analysis of the Operational License and Transportation Agreements demonstrates that Hi Tech, not CP, is responsible for Hi Tech's operation (see footnote 4, *supra*) and that CP's only real interest is in moving the freight cars Hi Tech loads and tenders to the railroad. Indeed, CP's lack of control is evident from the fact that it was not even able to have Hi Tech abide by its contractual obligation to obtain the necessary permits from NJDEP. (*See* the Operational License Agreement between Hi Tech and CP, appended as Exhibit A to Hi Tech's Petitions, at Article 4(e).) [6]

Similarly, the fact that Hi Tech's facility and some of its operations are conducted on CP's property does not invest these activities with preemption coverage. The Eleventh Circuit rejected a similar preemption claim by the lessee of a railroad, called Rinker Material Services Corporation or "Rinker," in *Florida East Coast Railway Co. v. City of West Palm Beach,* 266 F. 3d 1324 (11th Cir. 2001) ("*FEC*"). The only functional difference between the two cases is that Hi Tech uses the property to assemble shipments *prior* to rail transportation, while in *FEC* the railroad premises were used by Rinker to distribute the shipments *subsequent* to rail transportation. The Eleventh Circuit properly held that the activities by Rinker on FEC's premises

> serve no public function and provide no valuable service to FEC; rather, the arrangement between FEC and Rinker merely facilitates Rinker's operation of a private distribution facility on FEC-owned-premises. Furthermore, record evidence, such as Rinker's being the sole FEC customer to use the 15th Street yard, Rinker's taking responsibility for its utility expenses on the property, and a sign on the property reading "CSR Rinker – West Palm Beach Aggregate Distribution," indicates that Rinker's function served a purely private function. As stated by the district court, "Rinker effectively ran a Rinker operation on FEC property." 110 F. Supp. 2d at 1371.

266 F.3d at 1336. In view of the virtually identical record evidence in this proceeding, the same conclusion was inevitable in *Hi Tech II.*

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[6] CP's right to approve the design of Hi Tech's facility and veto power over alterations is no different than the powers landlords normally retain over premises they lease. But that does not mean that these landlords control the lessee's operations.

III. *HI TECH II* IS CONSISTENT WITH FEC AND OTHER DECISIONS

As NS points out (NS Petition, at 4), the conclusion in *Hi Tech II* - - that the "activities must be both: (1) transportation; and (2) performed by, or under the auspices of, a rail carrier"in order to fall within the § 10501(b) preemption - - is simply an explicit statement of a principle that always existed and does not alter the Board's view on this issue. That holding is consistent with the plain language of the statute, which defines the Board's jurisdiction to be over "transportation by rail carrier," not "activities related to rail transportation generally." Since the *Hi Tech* proceeding is the first instance in which the Board has had to address the activities of a non-rail carrier's activities, it was not previously necessary for the Board to explain that the preemption was limited to activities of a rail carrier.[7]

CP and CN fall back on the baseless speculation that *Hi Tech II* may tend to "have a chilling effect" on arrangements rail carriers may have with third parties. (CP Petition at 7, CN Petition at 2.) Precisely why this should be so is unanswered, since (1) the decision in no way infringes on a rail carrier's ability to conduct transloading activities directly or through the use of agents, and (2) a third party can provide such services for its own account if it has otherwise complied with federal, state and local regulatory requirements. In most cases, this should not be a problem; indeed, Hi Tech still has not explained why it believed it necessary to embark on a scorched earth litigation policy

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[7] NJDEP pointed out, in the NJDEP Reply, at 8-9, that in *Fletcher Granite Company, LLC - - Petition for Declaratory Order*, Finance Docket No. 34020 (STB served June 29, 2001) ("*Fletcher Granite*") the Board did not address the substantive issue of whether the activities of that non-carrier were subject to preemption due to the lack of a live controversy. Nor was there any record evidence that would have indicated whether those operations were controlled or were otherwise being performed by, or under the auspices of, a rail carrier. As such, *Fletcher Granite* provides no guidance at all. On the other hand, in *Borough of Riverdale -- Petition for Declaratory Order – The New York, Susquehanna & Western Railway Corporation,* Finance Docket No. 33466 (STB served September 10, 1999)("*Riverdale I*"), the Board concluded that the facilities of a non-carrier were not within the preemptive scope of Section 10501(b):

> If this facility is not integrally related to providing transportation services, but rather serves only a manufacturing or production purpose, then, *like any non-railroad property,* it would be subject to applicable state and local regulation.

Riverdale I, at10 (emphasis added).

in order to forestall New Jersey's oversight of its activities. Nor has CP explained why, assuming it was relevant (which is not the case), it should be concerned about the possible cessation or interruption of Hi Tech's operations (CP Petition, at 5); CP plainly contemplated that Hi Tech would obtain the necessary clearances from NJDEP prior to commencing operation and hardly has a vested interest or property right arising out of Hi Tech's continued violation of state law or breach of its contractual commitments.

Regardless, the holding in *Hi Tech II* is totally consistent with the one case, *FEC*, where this issue has been squarely raised. As noted above, the Eleventh Circuit, in affirming the district court's finding of no preemption for the Rinker operation, concluded that those activities were not integrally related to the provision of rail transportation. Hi Tech's activities are no different and are no more integrally related to the provision of rail transportation than are the activities of any rail shipper.

Significantly, the *FEC* court also rejected the same argument now being raised by CP - - namely, that it is purportedly illogical for the ownership or control of the activities, rather than what services are being provided to determine whether those activities fall within the scope of the preemption. (CP Petition, at 7.) The court squarely held that this was the result of the statute and contravened no statutory or constitutional tenets:

> Contrary to FEC's suggestion, therefore, the ICCTA's preemption of state regulation of rail "transportation" does not preclude a determination that certain actions taken by West Palm Beach, which might or might not be pre-empted if taken against FEC, do not violate the Supremacy Clause when applied against Rinker in its operations on FEC property.

FEC, 266 F. 3d at 1336-37.

CP (Petition at 3) cites to *dicta* contained in a footnote in FEC for the proposition that it might be possible that regulations directed at a third party might be so intertwined with rail operations as to be subject to preemption. *FEC,* 266 F. 3d at 1337 n.9.[8] In the first place, the court

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[8] CP also urges that the Board should follow the holding of Administrative Law Judge Masin in the state administrative proceeding involving Hi Tech's facility that was initiated by NJDEP. NJDEP has already explained why that initial decision was erroneous and has no force or effect (NJDEP Reply, at 9-10) and incorporates those arguments here.

obviously concluded that Rinker (the mirror image of Hi Tech) was not entitled to the preemption. Moreover, the cited language does no more than suggest that an operation of a third party controlled or otherwise under the auspices of a rail carrier may be subject to the preemption. Accordingly, the cited footnote lends no support for an expansive vision of the preemption and is fully consistent with the decision in *Hi Tech II.*

CP claims to be confused about the results of the *Hi Tech II*, suggesting that there is a lack of guidance concerning what is meant by the "performance of transportation 'under the auspices of' a rail carrier." (CP Petition, at 7.) But just as Hi Tech "muddied the waters" through its various filings and actions (*Hi Tech II* at 5), so has CP contributed to any confusion that might truly exist. After all, CP failed to insist that Hi Tech honor its contractual obligations to obtain the necessary permits. And, CP failed to properly structure its relationship with Hi Tech, which resulted in the filing, then withdrawal, of Hi Tech's Notice of Exemption to become a rail carrier in Finance Docket 33901, *Hi-Tech Trans, LLC - - Operation Exemption - - Over Lines Owned by Canadian Pacific Railway and Connecting Carriers*. While keeping its eyes shut and simply accepting Hi Tech's traffic without regard to the many questions being raised as to its lessee's status, CP intentionally elected to avoid participating in developing the record in this matter.[9] It is too late in the day, and contrary to the intervention rule in 49 C.F.R. § 1112.4, for CP or CN to now seek to disrupt the proceedings here by seeking additional comments or broadening the issues. Hi Tech has been operating in defiance of its obligations under New Jersey law for several years, and NJDEP - - and other adversely affected interests - - are entitled to a final decision which brings the curtain down on such unsanctioned activities.

In any event, CP's alleged need for further guidance is frivolous. Its contention (CP Petition at 7) that *Hi Tech II* "implies that the outcome might be different" if Hi Tech performed some services as a "contract operator" of CP is patently incorrect. The footnote in *Hi Tech II* cited by CP

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[9] CN's suggestion (CN Petition at 4, n.4) that the Director of the Office of Proceedings "had no factual record" is incorrect. Hi Tech submitted verified statements and the other parties submitted evidentiary exhibits, as well as briefs. The record in this case was more than ample to permit the issuance of an informed decision.

says nothing of the kind, is not ambiguous and is plain and direct. The footnote says only - - and correctly - - that Hi Tech's

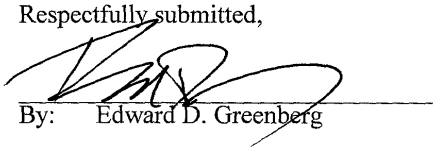
> situation is substantially different from a situation in which a rail carrier builds and owns a track-to-rail transloading facility, and holds it out to the public as its own facility, but chooses to have it run by a contract operator.

There is no implication in this footnote that Hi Tech's operation can be parsed into some arbitrary list of component parts, the provision of any of which might be a basis for finding that Hi Tech is entitled to the preemption. Instead, the text simply says that the operation of a CP transload facility by a third party operator *in the name of CP* would not deprive CP and its agents of the preemption, since the transportation related activities would be performed *under the auspices* of CP. That not being the case here, Hi Tech is not entitled to the preemption.

IV. CONCLUSION

For the foregoing reasons, the decision should be affirmed.

Respectfully submitted,



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Special Counsel for the State of New Jersey,
Department of Environmental Protection

Dated: September 15, 2003

Certificate of Service

I hereby certify that a copy of the foregoing State of New Jersey, Department of Environmental Protection, **REPLY TO PETITIONS TO INTERVENE AND COMMENTS OF NORFOLK SOUTHERN RAILWAY COMPANY, DELAWARE AND HUDSON RAILWAY COMPANY, INC. AND CANADIAN NATIONAL RAILWAY COMPANY** was served this 15th day of September, 2003 via Facsimile, Federal Express and/or USPS First Class Mail to the following:

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